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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 1108

WILLIAM S. GIRARD,
Petitioner-Appellant,

v.

CHARLES E. WILSON, ET AL.,
Respondents-Appellees.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT.

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1) Title 28 U. S. Code. On June 21, 1957 a petition for Writ of Certiorari was granted and an order entered consolidating this case with *Wilson, et al.* v. *Girard*, No. 1103, October 1956 Term and assigning both cases for argument on July 8, 1957.

Summary Statement of Matter Involved and Questions Presented

Petitioner-appellant, a soldier in the United States Army, is currently held in custody in Japan by United States Army officers at the instance of the Executive Branch of the United States Government. Prior to the injunction order of the Court below he was held in such custody for the purpose of being turned over to Japanese authorities for trial in a Japanese court for an act, which

his Commanding Officer certified and which the United States Attorney stipulated at the hearing, was done in the performance of official duty.

On June 18, 1957 an order was entered in the United States District Court for the District of Columbia as follows: "ORDERED that in accordance with the opinion filed this date, the petition for Writ of Habeas Corpus is denied, the rule to show cause is discharged, and that respondents and those over whom they exercise command function be, and they hereby are, enjoined from delivering petitioner to the Japanese government."

On this appeal, review by this Honorable Court is sought on only so much of the order as denies the petition for Writ of Habeas Corpus and discharges the rule to show cause. By reason of the District Court's failure to grant the writ the petitioner is still held in custody although no charges of any kind have been filed against him and although he may not be delivered to the Japanese Government for trial by reason of the injunction which was issued.

The questions presented on this appeal may be stated to be:

1. Is a person to be denied a Writ of Habeas Corpus although his detention has been found to be unlawful merely because he may possibly again be arrested and detained for other reasons or for a different purpose, and is declaratory or injunctive relief alone adequate and proper in such circumstances?

2. Is a person in our military service who is unlawfully detained by the military authorities to be denied relief by habeas corpus merely because upon release from confinement or detention he must continue to serve for the balance of his enlistment in the Armed Forces?

POINT I

Whenever imprisonment or detention is unlawful a writ of *habeas corpus* should be issued and the possibility of further arrest or detention of petitioner for other reasons or for a different purpose is not material. (Title 28 United States Code, Chapter 153.)

The District Judge (Honorable Joseph C. McGarraghy), although finding and concluding that the detention of the petitioner was unlawful, stated that "since the petitioner remains a member of the United States Armed Forces in Japan and *may be prosecuted* in Court-Martial proceedings for the offense with which he is charged (by the Japanese), the petition for the writ will be denied and the Court will treat the complaint as a Petition for Declaratory Judgment and Injunction * * *." (Italics supplied.)

The mere fact that an individual *may be* brought to trial before another tribunal or may possibly be lawfully arrested or detained at some future time is not sufficient reason for denying a writ of *habeas corpus*. *Medley, Petitioner*, 134 U. S. 160. The error would probably not have been made by the District Judge were he not pressed to make a quick determination. The Honorable John Foster Dulles, Secretary of State, in his affidavit dated June 10, 1957, in support of a "Motion to Expedite Determination" filed June 17, 1957, urged that "every hour" in which the case remained undetermined "prolongs a source of international friction and may have adverse effect upon our relations with Japan and other countries." Mr. Dulles made no mention of the fact that the life of an American citizen was at stake and that the precedent here established may affect the lives of many Americans for generations to come. He pressed for a quick determination to prevent "great embarrassment to the Government

of the United States." If there be any embarrassment it was brought about by his own acts which were designed to bypass the Senate of the United States in contravention of the United States Constitution and in disobedience of the Senate's express mandate. (North Atlantic Treaty, Status of Forces Agreement, T. I. A. S. 2846.) In any event the alarmist views expressed by Mr. Dulles are without foundation in fact.

In *Medley, Petitioner, supra*, it appears that Medley was duly convicted of murder in the State of Colorado. After commission of the offense, a law was enacted by the Legislature of the State of Colorado, which inflicted greater punishment than was provided at the time the crime was committed. Obviously such law is *ex post facto* and, in its application to Medley, was unconstitutional. This Honorable Court ordered Medley released from custody and stated that it was not within its province to determine whether the petitioner could be or may be imprisoned under different laws or for other reasons. Faced with a practical problem, this Court ordered that the Attorney General of the State of Colorado be notified of the exact day and time the petitioner was to be released from custody so that he might take appropriate action but the writ of *habeas corpus* issued nevertheless.

The *Medley* case stands for the proposition that a *habeas corpus* writ must issue in the event the detention is found to be unconstitutional or unlawful and that the Court may not deny the writ merely because there may, in the future, be some other basis for detaining the petitioner. See also *Lowrey v. Hiatt*, 73 F. Supp. 8.

In *Ex Parte Orozco*, 201 F. 106, a writ of *habeas corpus* was issued on application of an alien who was detained by the military authorities "by direction of the President." The Court ruled that the President of the United States does not have any power or authority not specifically vested in him by the Constitution and Laws of the United States. The de-

cision reviews the authorities and concludes that the President of the United States has no right to hold any person in arrest and that he may not do so in the exercise of any so-called discretionary power. If the President, as the Chief Executive and the Commander-in-Chief of the United States Armed Forces, lacks such power, it follows that his subordinates likewise lack such power.

The continued detention of Girard in restraint, without charges being filed against him and after it has been judicially determined that he may not be turned over to the Japanese Government for trial, is unlawful and illegal. The writ of *habeas corpus* should accordingly issue. *Motherwell* v. *United States*, 107 U. S. 437, reversed on other grounds 183 U. S. 424; *Ex Parte Merryman*, Fed. Case No. 9,487; *Ex Parte Milligan*, 71 U. S. 2; *Tucker* v. *Alexandroff*, 183 U. S. 424.

POINT II

A person in the military service who is unlawfully detained by the military authorities may not be denied relief by *habeas corpus* merely because, upon release from confinement or detention, he must continue to serve in the Armed Forces.

Habeas corpus has always been considered as the appropriate remedy to test the legality of detention by military authorities and whether the petitioner be a soldier or a civilian is of no consequence. If he is unlawfully detained, his release from confinement must be ordered. *Martin* v. *Young*, 134 F. Supp. 204. It is release from the unlawful detention which the Writ of *habeas corpus* accomplishes and not release from the continued performance of military duty. Furthermore, if there is any doubt as to what is intended, the Court may make specific provision in its order

to the effect that the Writ does not release petitioner from continuing in military service. Title 28 U. S. Code 2243 provides that the Court may "dispose of the matter as law and justice require."

If, as in this case, petitioner is found to be unlawfully detained, he must be released and the denial of the Writ is not authorized merely because he must continue to serve in the military service or merely because there is the possibility that at some future day court-martial charges may be filed against him or he may be prosecuted in a court-martial proceeding. *Lowrey v. Hiatt, supra; Martin v. Young, supra.*

CONCLUSION

The appeal from so much of the Order of the United States District Court as denies the writ of *habeas corpus* should be reversed and the case remanded to that Court directing that the writ be issued, forthwith.

Respectfully submitted,

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